Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

FERNANDO RESTREPO,

Petitioner,

v.

JOHN ASHCROFT,
Attorney General of the United States,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit erred in dismissing Mr. Restrepo's petition for review for lack of jurisdiction.

2. Whether Mr. Restrepo's conviction for failure to appear in violation of Title 8 U.S.C. § 3146 is an "aggravated felony" within the meaning of the Immigration and Nationality Act § 101(a)(43)(T), 8 U.S.C. § 1101(a)(43)(T).

LIST OF PARTIES

Petitioner is Mr. Fernando Restrepo.

Respondent is Mr. John Ashcroft, Attorney General of the United States, in his official capacity.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Fernando Restrepo, by and through his attorneys, Simon Azar-Farr & Associates, P.C., respectfully prays that this Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Fifth Circuit entered on July 12, 2002.

OPINION BELOW

In an order dated July 10, 2002, the United States Court of Appeals for the Fifth Circuit granted the Government's motion to dismiss. *Restrepo v. Ashcroft*, No. 02-60305 (5th Cir. July 10, 2002). The Fifth Circuit ruled that it did not have jurisdiction to consider Mr. Restrepo's claims.

JURISDICTION

The judgment and opinion of the Court of Appeals was entered on July 10, 2002. This petition is filed within 90 days of the entry of judgment, pursuant to Sup. Ct. R. 13.1. The Supreme Court has jurisdiction under Title 28 U.S.C. § 1254, which states that "cases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATEMENT OF THE CASE

A. Statement Of Facts

Mr. Restrepo, a native and citizen of Colombia, is a lawful permanent resident of the United States. He has resided in the United States for a considerable period of time, and he has a considerable number of relatives in this country, including two children who are United States citizens. In addition, Mr. Restrepo has a long and sustained history of employment.

Mr. Restrepo was charged on or about December 6, 1994, by way of indictment, with two counts of drug related offenses in a federal district court. In count one of the indictment, he was charged with conspiracy to violate Title 21 U.S.C. §§ 841(a)(1) and 846. In count two, he was charged with violating Title 21 U.S.C. § 841(a)(1).

Mr. Restrepo failed to appear for his criminal proceedings on December 15, 1994, and the U.S. Attorney's office filed an Information charging Respondent with violating Title 18 U.S.C. § 3146(a)(1) (failure to appear). The Information charged that "on or about December 15, 1994, . . . [Defendant] knowingly failed to appear before a court as required by the conditions of release, in violation of Title 18, United States Code § 3146." The original drug charges were subsequently dismissed, and on November 13, 1997, Mr. Restrepo pled guilty to the single count of failure to appear in violation of § 3146. Criminal Judgment, Case # A-94-CR-194JRN at 1 (W.D. Tex. Nov. 17, 1997). The applicable United States Sentencing Guidelines provided for a penalty of 12 to 18 months' imprisonment for his offense of failure to appear. *Id.* at 6. He was committed to the custody of the United States Bureau of Prisons to be

imprisoned "for a term of twelve (12) months and one (1) day." *Id.* at 2.

In a Notice to Appear (NTA) dated March 26, 1998, the Immigration and Naturalization Service charged that Mr. Restrepo is subject to removal from the United States. Notice to Appear, file # A40-245-228 (March 26, 1998). The NTA alleged that Mr. Restrepo was a lawful permanent resident of the United States and that he had been convicted on November 13, 1997 for the offense of failure to appear. *Id.* Based on this conviction, the NTA charged that Mr. Restrepo was subject to removal under § 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended, (INA), Title 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien who has been convicted of an "aggravated felony" as that term is defined under INA § 101(a)(43)(T), 8 U.S.C. § 1101(a)(43)(T). *Id.*

In administrative proceedings, Mr. Restrepo argued that he was not subject to removal as a matter of law because he had not been convicted of an aggravated felony as defined under 8 U.S.C. § 1101(a)(43)(T). The Immigration Judge ruled that Mr. Restrepo was subject to removal from the United States. Oral Decision of the Immigration Judge, file # A40-245-228 (Executive Office for Immigration Review, Immigration Court, February 16, 1999). The Board of Immigration Appeals, in a cursory decision, affirmed. Decision of the Board of Immigration Appeals, file # A40-245-228 (Apr. 10, 2002). Mr. Restrepo timely appealed the Board's decision to the United States Court of Appeals for the Fifth Circuit. The Government moved to dismiss Mr. Restrepo's petition for review for lack of jurisdiction, and the Court of Appeals, without elaboration, granted the Government's motion and dismissed the petition. *Restrepo v. Ashcroft*, No. 02-60305 (5th Cir. July

10, 2002). This timely petition for writ of certiorari followed.

B. Statement Of Jurisdiction Of The Court Of First Instance

Petitioner, Mr. Restrepo, filed a petition for review of the decision of the Board of Immigration Appeals with the United States Court of Appeals for the Fifth Circuit. As the Government conceded, the Court of Appeals had jurisdiction to determine whether it had jurisdiction over Mr. Restrepo's case. *Balogun v. Ashcroft*, 270 F.3d 274, 278 (5th Cir. 2001); *Vasquez-Velezmoro v. INS*, 281 F.3d 693 (5th Cir. 2002).

The Government argued, however, that the Court of Appeals lacked jurisdiction to grant Mr. Restrepo's petition for review because he had committed an aggravated felony under INA § 242(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). Under INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C), courts of appeals are stripped of jurisdiction over challenges to removal orders by aliens who have committed an aggravated felony.

Mr. Restrepo maintains, as he argued before the Court of Appeals, that he has not committed an aggravated felony as defined by the INA. Accordingly, the Court of Appeals had jurisdiction to hear the merits of his claim, and it erred by holding to the contrary.

REASONS FOR GRANTING THE PETITION

A. Mr. Restrepo has not been convicted of an aggravated felony within the meaning of the INA.

1. The Government has the burden of establishing by clear and convincing evidence that Mr. Restrepo has been convicted of an aggravated felony.

The Government has the burden of proof in removal proceedings. In *Woodby v. INS*, 385 U.S. 276, 286 (1966), the Supreme Court recognized the great hardship imposed by deportation and held that "no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true." The amended INA also requires that the INS prove the charge of removal by "clear and convincing evidence. . . . No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A). Therefore, Mr. Restrepo is not subject to removal unless the Government can prove that the grounds it alleges in support of Respondent's removal are true under the requisite standard of proof. The Government has to show by clear, unequivocal, and convincing evidence that Restrepo was convicted of an aggravated felony. More specifically, the Government must show that Mr. Restrepo (1) was convicted (2) of an offense relating to a failure to appear before a court (3) pursuant to an order to answer or dispose of a charge of a felony (4) for which a sentence of two years' imprisonment or more may be imposed. *See* 8 U.S.C. § 1227(a)(2)(A)(iii); 8 U.S.C. § 1101(a)(43)(T).

2. The Government has not proven that the conviction was "pursuant to an order to answer or dispose of a charge of a felony."

In order to prove that Mr. Restrepo has been convicted of an aggravated felony and is therefore removable under Title 8 U.S.C. § 1227(a)(2)(A)(iii), the Government must prove that Mr. Restrepo's failure to appear was "pursuant to an order to answer or dispose of a charge of a felony." *See* 8 U.S.C. § 1227(a)(2)(A)(iii); 8 U.S.C. § 1101(a)(43)(T).

Not all convictions under Title 18 U.S.C. § 3146(a)(1) qualify as aggravated felonies. The elements of proof for a conviction under § 3146(a)(1) are different than the elements of proof to sustain a charge of removal under Title 8 U.S.C. § 1227(a)(2)(A)(iii). Under § 3146(a)(1), the Government has to prove merely that the defendant (1) was released under chapter 207 of the Federal Code of Criminal Procedure, Title 8 U.S.C. § 3141 *et seq.*, and (2) knowingly (3) failed to appear (4) before a court (5) as required by conditions of release. On the other hand, to establish that Mr. Restrepo's conviction is an aggravated felony, the Government must prove that Mr. Restrepo (1) was convicted (2) of an offense relating to a failure to appear before a court (3) pursuant to an order to answer or dispose of a charge of a felony (4) for which a sentence of two years' imprisonment or more may be imposed. 8 U.S.C. § 1101(a)(43)(T).

It is not uncommon for the elements of a charge of deportability to differ from the elements of a criminal charge. For example, before its amendment in 1990, the section of the INA that made smuggling aliens a ground of deportation required the smuggling to be "for gain." *See* former INA § 241(a)(13), 8 U.S.C. § 1251(a)(13) (addressing the aiding and abetting "knowingly and for gain" of

any alien's entry into the United States). The criminal statute addressing alien smuggling did not include "for gain" as an element. *See* 8 U.S.C. § 1324. Therefore, a criminal conviction for alien smuggling was not dispositive as to an alien's deportability under the former INA § 241(a)(13). *See Matter of Farias-Mendoza*, 21 I. & N. Dec. 269 (BIA 1996) ("Previously, a criminal conviction for alien smuggling would not necessarily be sufficient to establish deportability because the criminal statutes for alien-smuggling activity do not include 'gain' as an element").

Likewise, a criminal conviction under Title 18 U.S.C. § 3146(a)(1) is not sufficient to establish that Mr. Restrepo's failure to appear was "pursuant to an order to answer or dispose of a charge of a felony" as required by Title 8 U.S.C. § 1101(a)(43)(T), because that element is not included within the language of § 3146(a)(1). Accordingly, Mr. Restrepo's criminal conviction alone does not prove his deportability under Title 8 U.S.C. § 1227(a)(2)(A)(iii). The Government has failed to present any evidence to prove that Mr. Restrepo's failure to appear in court was "pursuant to an order to answer or dispose of a charge of a felony." Absent such evidence, the Government has not proven the necessary elements of § 1101(a)(43)(T); by itself, Mr. Restrepo's conviction under § 3146(a)(1) does not qualify as an aggravated felony as defined by § 1101(a)(43)(T). Because the burden of proof is on the Government, and the Government has not proven all of the necessary elements, Mr. Restrepo is not deportable.

3. In determining whether Mr. Restrepo was subject to a sentence of at least two years' imprisonment, the relevant offense is the failure to appear.

Under Title 8 U.S.C. § 1101(a)(43)(T), the Government must prove that Mr. Restrepo's offense was one "for which a sentence of two years' imprisonment or more may be imposed." When § 1101(a)(43) is read as a whole, it is clear that the two year requirement relates to the failure to appear offense, not the underlying felony. The immigration judge found this to be the case. Oral Decision of the Immigration Judge at 6. In interpreting § 1101(a)(43)(T), a few courts appear to have assumed, without analysis, that the relevant offense is the underlying felony. *See Barnaby v. Reno*, 142 F. Supp. 2d 277, 279 (D. Conn. 2001); *United States v. Mejia*, 2000 U.S. App. LEXIS 21765 at *3 (unpublished op.) (9th Cir. 2000). As the following discussion demonstrates, however, a careful analysis supports this aspect of the Immigration Judge's interpretation.

A number of factors support the conclusion of the Immigration Judge. Section 1101 should be read in light of the canon of statutory construction that holds that "[e]very part of a statute must be viewed in connection with the whole, so as to make all its parts harmonize." *General Motors Acceptance Corp. v. Whisnant*, 387 F.2d 774, 778 (5th Cir. 1968) (citations omitted). Section 1101(a)(43)(T) defines an aggravated felony as "***an offense relating to*** a failure to appear before a court pursuant to a court order to answer or dispose of a charge of a felony ***for which a sentence of two years' imprisonment or more may be imposed.***" (Emphasis added by Petitioner). Section 1101(a)(43)(R) defines an aggravated felony as "***an offense relating to*** commercial bribery, counterfeiting, forgery, or

trafficking in vehicles the identification numbers of which have been altered ***for which the term of imprisonment is at least one year.***" (Emphasis added by Petitioner). Section 1101(a)(43)(S) defines an aggravated felony as "***an offense relating to*** obstruction of justice, perjury or subornation of perjury, or bribery of a witness, ***for which the term of imprisonment is at least one year.***" (Emphasis added by Petitioner). Each of these sections follows the same pattern and should be interpreted in the same way. In §§ 1101(a)(43)(R) and (S), the language, "for which the term of imprisonment . . . ," does not modify the last specific offense listed, but rather relates back to the language "an offense relating to" at the beginning of the section. Similarly, the language "for which a sentence of two years' imprisonment or more may be imposed" in § 1101(a)(43)(T) relates back to the failure to appear offense and does not merely modify the underlying felony.

This interpretation is further supported by looking to the language of § 1101(a)(43)(Q), which defines an aggravated felony as "an offense relating to a failure to appear by a defendant for service of sentence ***if the underlying offense is punishable by imprisonment for a term of five years or more.***" (Emphasis added by Petitioner). In § 1101(a)(43)(Q), Congress clearly stated that the term of punishment related to the underlying offense and not the offense of failure to appear for service of sentence. Had Congress intended for the term of punishment in § 1101(a)(43)(T) to relate to the underlying felony instead of the offense of failure to appear, it would have written § 1101(a)(43)(T) to mirror the language of § 1101(a)(43)(Q) and not that of §§ 1101(a)(43)(R) and (S).

4. Mr. Restrepo was not convicted of a failure to appear offense for which a sentence of two years' imprisonment or more may be imposed.

In determining whether Mr. Restrepo's failure to appear offense was one "for which a sentence of two years' imprisonment or more may be imposed," it is necessary to consider both the statutory sentence range and the United States Sentencing Guidelines applicable to the offense. Since both the statutory range and the Guidelines are provisions of federal law, both act to constrain a convicted defendant's potential sentence, and Congress can be presumed to have been aware of this when it enacted Title 8 U.S.C. § 1101(a)(43)(T). If Congress had not intended the Guidelines to be taken into account, it would have expressly said so.

Mr. Restrepo was convicted of violating Title 18 U.S.C. § 3146(a)(1). Section 3146(a) provides that "[w]hoever, having been released under this chapter knowingly – (1) fails to appear before a court as required by the conditions of release . . . shall be punished. . . ." Section 3146(b)(1)(A)(i) allows, in theory, for punishment by "a fine under this title or imprisonment for not more than ten years, or both." However, to determine whether a sentence of two years' imprisonment or more *may have been imposed* on Mr. Restrepo, it is necessary to turn to the United States Sentencing Guidelines. Pursuant to the Sentencing Reform Act of 1984, a sentencing court "***must*** select a sentence from within the guideline range." United States Sentencing Commission, Guidelines Manual, Ch.1, Pt.A (Nov. 1997) (Emphasis added by Petitioner). Additionally, according to Title 18 U.S.C. § 3553(b), a sentencing court "***shall*** impose a sentence of the kind, and ***within the***

range, referred to in subsection (a)(4), unless" there are aggravating or mitigating circumstances. (Emphasis added by Petitioner). Subsection (a)(4)(A) of § 3553 refers to "the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission."

A sentencing court may only deviate from the Sentencing Guidelines in two instances. First, it may deviate where it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." *Id.* (quoting 18 U.S.C. § 3553(b)). Second, it may deviate from the Sentencing Guidelines if they are inconsistent with a statutory mandatory minimum sentence. Tacha, Deanell, *Serving this Time: Examining the Federal Sentencing Guidelines After a Decade of Experience*, 62 Mo. L. Rev. 471, 476-77 (1997) (stating, "if the guideline sentence is inconsistent with a mandatory sentence, the mandatory sentence will trump the guidelines"). Except for these narrowly-tailored exceptions, the Sentencing Guidelines will otherwise control the sentencing for all felony and Class A misdemeanors in federal courts. U.S.S.G. Ch.1, Pt.A.

The Sentencing Guidelines clearly apply in Mr. Restrepo's case for the purpose of determining whether he was convicted of an offense for which a sentence of two years' imprisonment or more may be imposed. The judge in the criminal case used the Sentencing Guidelines when he sentenced Mr. Restrepo. The judge did not find any aggravating or mitigating circumstances requiring him to deviate from the Sentencing Guidelines. Further, there is no statutory minimum sentence in Title 18 U.S.C.

§ 3146(b)(1)(A)(i). Section 3146(b)(1)(A)(i) states only a maximum punishment, which is consistent with the sentence reached by the judge under the Sentencing Guidelines. Therefore, the statutory range of § 3146 cannot be considered to trump the Guidelines.

Under the Sentencing Guidelines, the judge in Mr. Restrepo's case was required to impose a sentence of between 12 and 18 months of imprisonment for his violation of § 3146(a). Section 2J1.6 of the Sentencing Guidelines called for a base offense level of six. Under § 2J1.6 (b)(A), Mr. Restrepo received another nine points because the underlying drug offenses could be punishable by imprisonment for a term of 15 years or more. Mr. Restrepo received an adjustment of two points for acceptance of responsibility under U.S.S.G. § 3E1.1(a). The resulting points totaled 13, which corresponded to a sentence of imprisonment between 12 and 18 months. The maximum sentence which Mr. Restrepo could have received was therefore 18 months. The judge did not have the discretionary power to sentence him to two years imprisonment, and thus he was not convicted of "an offense relating to a failure to appear . . . for which a sentence of two years' imprisonment or more may be imposed." Mr. Restrepo was simply not subject to a sentence of two years' imprisonment or more. Accordingly, Mr. Restrepo was not convicted of an aggravated felony as defined by Title 8 U.S.C. § 1101(a)(43)(T) and he is not subject to removal under Title 8 U.S.C. § 1227(a)(2)(A)(iii).

The above interpretation is compelled by a plain-text reading of § 1101(a)(43)(T), because it is beyond doubt that under the applicable sentencing laws, a sentence of two years or more may *not* be imposed on a defendant in Mr. Restrepo's situation. Several additional rules of statutory

construction further support the conclusion that Mr. Restrepo's conviction does not constitute an aggravated felony under § 1101(a)(43)(T).

One well-established canon of statutory construction provides that any doubts as to an intended construction must be resolved in favor of the alien. As the Supreme Court stated in *Fong Haw Ten v. Phelan*, 333 U.S. 6, 10 (1948), "[w]e resolve doubts in favor of [the alien] because deportation is a drastic measure." Given that Mr. Restrepo's preferred interpretation is plainly reasonable, it must prevail even if the Government could somehow prove that its interpretation was reasonable as well.

The equities in this case provide an especially compelling case for deference to Mr. Restrepo's interpretation under the rule of *Fong Haw Ten*. Mr. Restrepo has resided in the United States for a considerable period of time, has two United States citizen children and numerous other relatives in this country, and has a long and sustained history of employment. Under the Government's interpretation, Mr. Restrepo could face deportation and permanent banishment from the United States for the rest of his life, which would be a very drastic measure indeed. If, on the other hand, the Sentencing Guidelines are deemed to determine the maximum sentence, he will not be subject to removal under Title 8 U.S.C. § 1227(a)(2)(A)(iii). The difference in interpretation makes the difference between deportation and being allowed to stay in the United States. Thus, under *Fong Haw Ten*, this Court must resolve any doubts in Mr. Restrepo's favor and hold that the Sentencing Guidelines must be taken into account in determining whether a sentence of two years' imprisonment or more may have been imposed on Mr. Restrepo for his violation of Title 18 U.S.C. § 3146(a)(1).

This interpretation is further buttressed by the maxim that specific statutes trump general statutes. The Supreme Court has explained that "specific terms prevail over the general in the same or another statute which might otherwise be controlling." *Clifford E. MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944) (internal citations omitted). An application of this rule to Mr. Restrepo's case shows that the Sentencing Guidelines and not the language of Title 18 U.S.C. § 3146(b)(1)(A)(i) must prevail. The Sentencing Guidelines provide specific instructions for determining the sentence that was imposed on Mr. Restrepo for his violation of § 3146(a)(1). Section 3146(b)(1)(A)(i) merely states that "a fine under this title or imprisonment for not more than ten years, or both" may be imposed for a violation of § 3146(a)(1). Because the Sentencing Guidelines provide a specific sentence than does § 3146(b)(1)(A)(i), the Sentencing Guidelines must be used to determine whether Mr. Restrepo was subject to a sentence of two years' imprisonment or more for his violation of § 3146(a)(1).

The argument that the general guidelines set forth in § 3146(b)(1)(A)(i) control with respect to how long of a sentence Mr. Restrepo was subject to is based on a separation of the general law of § 3146(b)(1)(A)(i) and the specific Sentencing Guidelines. There is no reason to make such a distinction, as both are equally binding. The laws do not conflict; the Sentencing Guidelines merely provides more specific instruction as to when a given length of sentence may be applied than is given in the general range set up in § 3146(b)(1)(A)(i). The fact that the Sentencing Guidelines need not be followed in two narrow exceptions is irrelevant, as neither of those exceptions were found to apply in Mr. Restrepo's case.

Finally, the rule that statutory terms should not be treated as surplusage supports the interpretation that the Sentencing Guidelines must control. *See Bailey v. United States*, 516 U.S. 137, 145 (1995) (quoting *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994)) ("Judges should hesitate . . . to treat [as surplusage] statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense"). Title 8 U.S.C. § 1101(a)(43)(T) defines an aggravated felony as "an offense relating to a failure to appear before a court pursuant to a court order to answer or dispose of a charge of a felony ***for which a sentence of two years' imprisonment or more may be imposed***." (Emphasis added by Petitioner). This implies that Congress must have envisioned that some failure to appear charges would carry a sentence of two years' imprisonment or more, while others would carry a lesser maximum sentence. The highlighted language would be mere surplusage if Congress had not intended for the Sentencing Guidelines to control. Under Title 18 U.S.C. § 3146, punishments for failure to appear in connection with a felony charge range from "a fine under this title or imprisonment for not more than two years, or both" to "a fine under this title or imprisonment for not more than ten years, or both." 18 U.S.C. §§ 3146(b)(1)(A)(i) & (iii). Because the statutory maximum allows for a sentence of two years' imprisonment or more for *all* failures to appear to answer to or dispose of a charge of a felony under § 3146, this language would be unnecessary unless Congress intended for the Sentencing Guidelines to control. To give meaning to the language "for which a sentence of two years' imprisonment or more may be imposed," § 1101(a)(43)(T) must be read with the understanding that the Sentencing Guidelines control the

sentence that may be imposed for a violation of § 3146(a)(1).

It may be argued that given the possibility of conviction under state or foreign failure to appear statutes, the language "for which a sentence of two years' imprisonment or more may be imposed" under § 1101(a)(43)(T) was added to address state or foreign convictions, thus giving meaning to the language even though such language is unnecessary in every case under § 3146(a)(1). However, it is unclear, and the Government has not demonstrated, that state or foreign convictions for failure to appear would carry less than a two-year sentence. The Texas statute governing failure to appear, for example, dictates that "[a]n offense under this section is a felony of the third degree if the offense for which the actor's appearance was required is classified as a felony." Tex. Penal Code § 38.10(f). A felony of the third degree "shall be punished by imprisonment . . . for any term of not more than 10 years or less than 2 years." Therefore, under Texas law, failure to appear for a felony (which is the offense covered by Title 8 U.S.C. § 1101(a)(43)(T)) carries a minimum two-year sentence. The language of § 1101(a)(43)(T), "for which a sentence of two years' imprisonment or more may be imposed," is not necessary under Texas law any more than it is needed under § 3146(b)(1)(A)(i) (when considered apart from the Sentencing Guidelines).

In sum, Mr. Restrepo's conviction cannot be considered an aggravated felony because it was not punishable by imprisonment of two years or more. The plain text of § 1101(a)(43)(T) forecloses the Government's suggestion that the Sentencing Guidelines are irrelevant for purposes of determining the maximum sentence. Moreover, Mr. Restrepo's interpretation is also supported by rules of

statutory construction revolving doubt in favor of the alien, giving preference to specific statutes over general ones, and construing statutes so as not to render part of the statute surplusage.

B. Even if the two-year requirement in § 1101(a)(43)(T) is construed as referring to a sentence of imprisonment for the underlying felony, the government has not proven that Mr. Restrepo's conviction falls within the definition.

Assuming, *arguendo*, that the underlying felony is the relevant offense under § 1101(a)(43)(T), the Government still has not proven that Mr. Restrepo was subject to a sentence of imprisonment of at least two years. To determine the maximum sentence for Mr. Restrepo's underlying drug charges (which, as noted, were subsequently dismissed), the Government would have to prove both the type and the quantity of the controlled substance involved, and it has failed to do so. Determining the potential sentence for a violation of Title 21 U.S.C. § 841(a)(1) requires reliance on the Drug Quantity Table. Reliance on the Drug Quantity Table in turn will lead to greatly varying sentences depending on the specific type and quantity of the controlled substance involved in a given case. U.S.S.G. § 2D1.1.

For example, if the controlled substance involved were cocaine, the base offense level would range from 12 points to 38 points depending on the quantity of cocaine involved. *Id.* If no other factors affected the offense level and the defendant had a criminal history category of I, his appropriate sentence range could be anywhere from 10 to 16 months all the way up to 235 to 293 months. U.S.S.G.

Ch.5, Pt.1. Even recognizing that under certain circumstances minimum sentences provided for in § 841 could trump the Sentencing Guidelines, the Government would still have to prove the type and quantity of the controlled substance involved before an appropriate sentence for a violation of § 841(a)(1), because these factors also influence the applicability of minimum sentences.

The onerous burden of proving the specific details of the underlying felony charge, especially like the one in this case which was ultimately dismissed, is yet another illustration of why it is unreasonable to interpret § 1101(a)(43)(T) to refer to the underlying felony, and not the offense relating to a failure to appear, as the relevant offense for determining whether Mr. Restrepo was subject to a sentence of two years' imprisonment or more. If each application of § 1101(a)(43)(T) required a determination of the potential sentence for the underlying offense, then in any case that did not end in conviction for the underlying offense, the Government would effectively be required to conduct a mini-trial to prove the possible sentences that the defendant could have received. This cumbersome and costly inquiry should not be read into a clause which, when read in light of the statute as a whole, appears to refer not to the underlying offense, but to the failure to appear offense. Even if the statute is read this way, however, the Government has failed to prove that it applies to Mr. Restrepo's conviction.

C. Given the risk of harm caused by differing interpretations of the concept of maximum sentence, it is imperative that this Court establish a uniform standard.

The interpretation of Title 8 U.S.C. § 1101(a)(43)(T) favored by the government and apparently adopted by the Fifth Circuit defines the length of the term of imprisonment that "may be imposed" without reference to the federal Sentencing Guidelines. This interpretation is inconsistent with the approach that federal courts have taken when addressing this issue in related contexts.

In addition to § 1101(a)(43)(T), several other immigration-related statutes contain references to maximum potential sentence. For example, Title 8 U.S.C. § 1101(a)(43)(J) defines certain racketeering-related offenses as an "aggravated felony" only if the offense is the kind "for which a sentence of one year imprisonment or more may be imposed". Title 8 U.S.C. § 1227(a)(2)(A)(i)(II) renders deportable any alien who is "convicted of a crime for which a sentence of one year or longer may be imposed." A federal felony is considered to be a crime punishable by imprisonment for a period in excess of one year. *See Matter of Davis*, Interim Decision # 3181 (BIA May 28, 1992). For equal protection purposes, it is crucial that courts interpret these and other provisions of law uniformly.

In contrast to the Fifth Circuit, other federal courts have accepted without hesitation that when interpreting a provision that refers to the maximum possible sentence with language such as "may be imposed," the federal Sentencing Guidelines must be taken into account. For example, in *United States v. Qadeer*, 953 F. Supp. 1570 (S.D. Ga. 1997), the INS sought to deport an alien under 8

U.S.C. § 1251(a)(2)(A)(i) (now recodified at § 1227(a)(2)(A)(i)) on the ground that he had committed "a crime for which a sentence of which one year or longer may be imposed." The court held that although Qadeer had been sentenced to only 8 months' imprisonment, § 1251(a)(2)(A)(i) rendered him deportable because the sentencing guidelines applicable to his theft offense provided for a term of 6 to 12 months. The court noted that "district courts need [not] concern themselves with the term of imprisonment which has been imposed but need only look to the maximum term of imprisonment which may be imposed under the relevant statute *and sentencing guidelines*." 953 F. Supp. at 1580. (Emphasis added by Petitioner).

A similar approach was taken by the court in *Hypolite v. Blackman*, 57 F. Supp. 2d 128 (M.D. Pa. 1999). In *Hypolite*, the petitioner argued that his drug conviction could not be considered a federal felony because he had been sentenced to only six months' imprisonment. Citing *Matter of Davis*, *supra*, the court held that the relevant inquiry was whether the offense was punishable by a term in excess of one year. 57 F. Supp. 2d at 138. Again relying on the federal Sentencing Guidelines, the court ruled in favor of the INS because "Hypolite's offense had a federal sentencing guideline of 57 to 71 months imprisonment, well in excess of one year." *Id.*

It is not surprising that other courts have taken the sensible approach of referring to the Sentencing Guidelines when computing a maximum potential sentence. What is surprising is that the Fifth Circuit has adopted such a counterintuitive and unorthodox interpretation. Accordingly, the outcome of Mr. Restrepo's case may well have been substantially different had he brought his petition within another circuit. The high likelihood that

similarly situated aliens would be subjected to disparate treatment violates Mr. Restrepo's right to equal protection of the law under the U.S. Constitution. For his sake and his right to due process of law, and for the sake of other aliens who find themselves in a similar position, it is vital that this Court clarify the proper interpretation.

CONCLUSION

Because Mr. Restrepo has not been convicted of a failure to appear offense punishable by at least two years' imprisonment, he has not been convicted of an aggravated felony. By dismissing Mr. Restrepo's petition for lack of jurisdiction, the Court of Appeals implicitly held to the contrary. To let this erroneous decision stand would work a grave injustice on Mr. Restrepo and all others affected by this important issue. The clear risk of disparate results within different circuits underscores the need for a careful reexamination of the law. For all of the foregoing reasons, Mr. Restrepo respectfully prays that this Court grant his petition for a writ of certiorari so that his order of removal and deportation may be reviewed.

Dated: August 19, 2002, and

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-60305

FERNANDO RESTREPO

Petitioner

v.

JOHN ASHCROFT, U S ATTORNEY GENERAL

Respondent

Petition for Review of an Order for the
Board of Immigration Appeals

(Filed July 10, 2002)

Before JOLLY, BARKSDALE, and STEWART, Circuit Judges.

BY THE COURT:

IT IS ORDERED that respondent's motion to dismiss the petition for review for lack of jurisdiction is GRANTED

IT IS FURTHER ORDERED that respondent's alternative motion to extend the time in which to file the administrative record for a period of thirty (30) days after the court's ruling on the motion to dismiss is DENIED AS MOOT

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A40-245-228-San Antonio Date: APR 10 2002

In re: RESTREPO, FERNANDO**

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Azar-Farr, Simon M., Esquire

ON BEHALF OF SERVICE: Graciela G. Garza, Assistant District Counsel

ORDER:

PER CURIAM: The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(a)(7).

/s/ [Illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
San Antonio, Texas

File No.: A 40 245 228 February 16, 1999

In the Matter of)
FERNANDO RESTREPO) IN REMOVAL
) PROCEEDINGS
Respondent)

CHARGE: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act: alien convicted of an aggravated felony as defined in Section 101(a)(43)(T) of the Act.

APPLICATIONS: Termination of proceedings; Section 212(h) of the Immigration and Nationality Act: waiver of inadmissibility.

ON BEHALF OF RESPONDENT:

Simon Azar-Farr, Esquire
2313 N. Flores
San Antonio, Texas 78212

ON BEHALF OF SERVICE:

Graciela G. Garza, Esquire
Immigration and
Naturalization Service
P. O. Box 1939
San Antonio, Texas 78297

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a male, native and citizen of Colombia, who is a lawful permanent resident of the United States. On March 26, 1998, the Immigration and Naturalization Service (hereinafter the Service) issued a Notice to Appear, charging that the respondent is subject to deportation pursuant to Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act in that after admission

he was convicted of an aggravated felony as defined in Section 101(a)(43)(T) of the Act. On April 22, 1998, the Immigration Service vested jurisdiction over this case with the San Antonio Court by filing the Notice to Appear.

At a hearing on December 1, 1998, the respondent, through counsel, appeared before the Court and admitted factual allegations one and two, contained in the Notice to Appear. Respondent, through counsel, denied factual allegations three, and four. The respondent also denied deportability pursuant to Section 237(a)(2)(A)(iii) of the Act.

At the hearing on December 1st, the respondent filed a Motion to Terminate proceedings. Respondent contends that his conviction pursuant to 18 U.S.C. Section 3146 is insufficient to establish that he has been convicted of an offense relating to a failure to appear pursuant to a Court order, answer to or to dispose of a charge of a felony, pursuant to Section 101(a)(43)(T) of the Act, and thus his conviction does not establish deportability pursuant to Section 237(a)(2)(A)(iii) of the Act. The respondent contends that he was not convicted of an offense for which a sentence of two years imprisonment or more may be imposed because the United States Sentencing Guidelines control the sentencing of all felony and Class A misdemeanors in Federal courts. Respondent contends that the penalty provisions outlined at 18 U.S.C. 3146(b) do not control the sentence which could be imposed. Under the sentencing guidelines as calculated by the Federal judge in this case, the respondent argues that he could have been imprisoned for only 18 months, and thus he is not deportable under Section 237(a)(2)(A)(iii) of the Act. In support of this contention, respondent argues that "because a sentence of two years imprisonment or more may be imposed

for all failures to appear to answer to or dispose of a charge of a felony under Section 3146, this language would be unnecessary unless Congress intended for the sentencing guidelines to control." Respondent's argument, however, does not address the length of a sentence that may be imposed under state statutes or foreign law. *See* the penultimate sentence of Section 101(a)(43) of the Act.

Respondent also contends that under Section 101(a)(43)(T) of the Act, a conviction for a charge relating to the failure to appear is the offense considered when determining whether a sentence of two years imprisonment or more may have been imposed, not the underlying felony an individual is convicted of failing to appear for, pursuant to 18 U.S.C. Section 3146. Respondent further contends, however, that assuming arguendo that the underlying felony is the offense examine [sic] when determining the two year imprisonment requirement, the Service in this case must prove the type and quantity of the controlled substance involved in the underlying felony charge before the Court would be able to determine whether a sentence of two years imprisonment or more may have been imposed. The Service did not file any written response to the respondent's Motion to Terminate.

The record in this case reflects that on July 1 1997, the respondent, pursuant to Court [sic] I of a superseding indictment filed in the United States District Court, Western District of Texas which charged with violating 21 U.S.C. Section 846 [sic] in that he unlawfully, knowingly, and willfully, did combine, conspire, confederate and agree with others unknown to possess with intent to distribute cocaine, a schedule two controlled substance. In Count II of the same indictment, respondent was charged with violating 21 U.S.C. Section 841(a)(1) in that he knowingly,

intentionally, and willfully did possess with intent to distribute cocaine, a schedule two controlled substance. In Count III, he was charged with violating 18 U.S.C. Section 3146, in that having been released under Title 18, Chapter 207, he knowingly failed to appear before the Federal court as required by the conditions of release. The record further reflects that a subsequent one count information charging respondent with violating 18 U.S.C. Section 3146 was filed with the United States District Court, Western District of Texas, on September 5, 1997.

The record also reflects that on September 10, 1997, the respondent, through a plea agreement pled guilty to one count of violating 18 U.S.C. Section 3146, failure to appear before a court as required by the conditions of release, in the United States District Court, Western District of Texas. On November 13, 1997, respondent was sentenced to 12 months and one day imprisonment, three years supervised released [sic] thereafter, and fined $1,000.

In addressing respondent's contentions, I find that respondent's criminal conviction for violating 18 U.S.C. Section 3146 is an offense relating to a failure to appear before a court, pursuant to Section 101(a)(43)(T) of the Act. Section 101(a)(43)(T) of the Act provides that the term "aggravated felony" means an offense relating to a failure to appear before a court, pursuant to a court order to answer to or dispose of a charge of a felony, for which a sentence of two years imprisonment may be imposed. *See* Section 101(a)(43)(T) of the Act. 18 U.S.C. Section 3145 applies to a failure to appear by defendant who is released, pending trial, sentencing, appeal, or surrender for service of sentence. *See* 18 U.S.C. Section 12J1.6, Commentary.

Based on the record in this case, I find that the respondent, while on release pending judicial proceedings under Title 18, Chapter 207, failed to appear before the United States District Court, Western District of Texas on December 14, 1994, to stand trial for violating 18 U.S.C. Section 842, and 18 U.S.C. Section 846, both felony charges. As noted by the respondent, all failure to appear offenses under Section 3146(b) where the underlying offense is a felony, are punishable by up to two years imprisonment, at a minimum.

I find that the United States Sentencing Guidelines do not apply when determining whether a sentence of two years imprisonment may be imposed pursuant to Section 101(a)(43)(T) of the Act. Rather, I find that the statutory sentencing requirements set forth in 18 U.S.C. Section 3146(b) are controlling. In adding crimes to the definition of "aggravated felony", Congress extended effort "to ensure that the overall reach of the definition would be consistent with the sentencing guidelines established by the United States Sentencing Commission." *See* H.R. Conf. Rep. No. 104-22, 1995 WL 56411. Based on this legislative history, I believe that Congress when adding offenses to the term aggravated felony was mindful of the United States Sentencing Guidelines, and, if it intended for the Immigration Courts to apply the sentencing guidelines when determining the length of sentences that may be imposed under Federal statutes, it would have expressly so provided. In addition, the term "aggravated felony" applies to an offense committed in violation of Federal or state law, or in certain cases, the law of a foreign country.

As argued by the respondent, the Court finds that the charge to be considered in determining whether a sentence of two years imprisonment may be imposed under Section

101(a)(43)(T) is the offense relating to the failure to appear conviction, not the underlying felony for which the individual failed to appear. Support for this position is found in Section 101(a)(43)(Q) of the Act. That Section provides that the term aggravated felony includes "an offense relating to a failure to appear by a defendant for service of sentence *if the underlying offense* is punishable by imprisonment for a term of five years or more." Section 101(a)(43)(T) on the other hand, does not refer to the underlying offense or otherwise indicate that the Court should look to the punishment a respondent could have received for a charge for which he may not have been convicted, as in this case.

In the alternative, if the underlying felony is the offense to be considered when determining whether a sentence of two years imprisonment or more may have been imposed under Section 101(a)(43)(T) of the Act, a sentence of two years imprisonment or more may have been imposed for either of the underlying felonies for which the respondent failed to appear. *See* 21 U.S.C. 841(b)(1)(A), (B) and (C). Section 846 provides that an individual "shall be subject to the same penalties as those prescribed for the offense, the commission of which as the object of the attempt or conspiracy."

Based on the above, I find that the respondent's Motion to Terminate should be denied. According [sic], I find that the evidence of record establishes by clear and convincing evidence that the respondent was convicted for failing to appear to answer a charge of felony, and that the failure to appear was punishable by a sentence of two years or more, and consequently, that the respondent is removable as charged.

Respondent also seeks relief pursuant to Section 212(h) of the Act. That section of law, however, provides that relief pursuant to Section 212(h) of the Act is not available to aliens lawfully admitted for permanent residence who have been convicted of an aggravated felony. Although respondent argues that Section 212(h) of the Act is unconstitutional, it is well settled that this Court has no power to declare the statute under which it operates unconstitutional.

Considering the charge of deportability, which I have found to have been sustained based on the record before me, I find that the respondent is ineligible for any form of relief from an order of removal.

Accordingly, the following orders are hereby entered:

ORDER

IT IS ORDERED that the respondent's Motion to Terminate be denied.

IT IS FURTHER ORDERED that the respondent's request for leave to file an application for a waiver of inadmissibility pursuant to Section 212(h) of the Act be denied.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Mexico on the charge contained in the Notice to Appear.

/s/ _____
Glen P. McPhaul
Immigration Judge